In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Chapter 13 Case
ELVIRA ALEXANDER	)	
	)	Number 97-20394
Debtor	)	
	)	
	)	
	)	
AMERICAN GENERAL FINANCE, INC.	)	
	)	
Movant	)	
	)	
	)	
v.	)	
	)	
ELVIRA ALEXANDER	)	
	)	
Respondent	)	

MEMORANDUM AND ORDER

This matter comes before the Court on the objection to confirmation by American General Finance, Inc. ("AGF"). Debtor filed a Chapter 13 petition on April 2, 1997. Her plan proposes to pay her government guaranteed student loan from the Illinois Student Assistance Commission ("ISAC") in full, while paying a dividend to general unsecured creditors of approximately 64 per cent. AGF is an under-secured creditor, with a secured claim of $1000.00 and an unsecured claim of $667.04, which would be paid on a pro rata basis

with other general unsecured claims. The claim of ISAC is $ 3896.50. AGF objects to confirmation under Section 1322(b)(1), on the ground that as proposed, the plan discriminates unfairly against unsecured creditors.[1]

The issue in this case in many respects brings the Court full circle in attempting to assess the permissible treatment of student loan obligations under the Code. It is, indeed, a circuitous course, marked by changes Congress has periodically adopted in the treatment of these obligations under Chapter 13. At the risk of beginning at too elementary a level, Chapter 13 provides debtors the opportunity to obtain a discharge of debt after repayment, to the extent of disposable income, for three to five years under a confirmed plan of reorganization. Debtors remain in possession of property during the life of the plan protected by the automatic stay. Chapter 13 differs from Chapter 7 in that the discharge is broader in scope; as a result the Chapter 13 discharge is commonly referred to as a "super" discharge. *Compare* 11 U.S.C. § 523 *with* 11 U.S.C. § 1328.

As initially adopted, the Bankruptcy Code of 1978 excepted student loans from the Chapter 7 discharge but not from the Chapter 13 discharge. In 1990 11 U.S.C. Section 1328(a)(2) was amended to create an exception from the Chapter 13 discharge for student loan obligations which were already excepted from discharge under 11 U.S.C. Section

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[1] 11 U.S.C. §1322(b)(1) states:

> The plan may designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims.

523(a)(8). *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990). Since that time, bankruptcy courts have disagreed as to whether a Chapter 13 debtor was permitted, or indeed could be required, to separately classify and provide for full payment of claims which would be non-dischargeable. *Compare* In re Foreman, 136 B.R. 532 (Bankr. S.D.Iowa 1992)(separate classification not unfair discrimination); In re Tucker, 130 B.R. 71 (Bankr. D.Mont. 1993) (same); and In re Boggan, 125 B.R 533 (Bankr. N.D.Ill. 1991) (same) *with* Groves v. LaBarge, 39 F.3d 212 (8th Cir. 1994) (separate classification unfair discrimination); McCullough v. Brown, 162 B.R. 506 (N.D.Ill. 1993) (same); In re Colfer, 159 B.R. 602 (Bankr. D.Me. 1993) (same); and In re Saulter, 133 B.R. 148 (Bankr. W.D.Mo. 1991) (same).

I. Liquidation Analysis Under 11 U.S.C. § 1325(a)(4)

Following the 1990 Amendments, I ruled that government guaranteed student loans could be treated in a confirmable plan only by payment in full, or by curing any arrearage and maintaining monthly payments if the maturity of the student loan extended beyond the final payment date under the plan pursuant to 11 U.S.C. Section 1322(b)(5). *See* In re Salyer, Ch. 13 No. 91-60201, slip op. at 4 (Bankr. S.D.Ga. Dec. 12, 1991) (Davis, J.); *see also* In re Bauman, Ch. 13 No. 93-41818, slip op. at 4 n.1 (S.D.Ga. June 9, 1994) (Davis, J.) (explaining rationale in student loan treatment).[2]

[2] Pre-1990 unpublished rulings of this Court reached the same results as in Salyer, although for different reasons. *Accord* In re Freshley, 69 B.R. 96 (Bankr. N.D.Ga. 1987) (allowing payment in full where student loans dischargeable in Chapter 13).

The rationale in Salyer and Bauman followed the dual reasoning that the liquidation analysis of Section 1325(a)(4) required full payment[3] and that requiring debtors to pay their student loans in full simply mirrored the exception from discharge of Section 1328(a)(2). The same rationale was employed to require debtors to fully fund child support and alimony obligations in a confirmable plan. In so ruling, I employed a far different approach than the Eighth Circuit in the Groves decision, a post-1990, pre-1994 amendment case, which refused separate classification for payment of government guaranteed student loans, while approving in dicta of such treatment with regard to child support and alimony obligations. *See* Groves v. LaBarge, 39 F.3d 212 (8th Cir. 1994). The Groves decision adopted the bankruptcy court's reasoning that public policy favors the payment of child support but does not dictate full payment of student loan obligations. Id. at 215. How the bankruptcy court was able to discern, from the Code, that public policy favored the payment of one and not the other when the Chapter 13 discharge excepted both obligations eludes me.[4]

Thus, in this District, Chapter 13 plans were confirmable only if both student loans and alimony/child support claims were fully funded. Subsequent to this Court's

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[3] My view on this subject has now been modified in light of the recent decision of the Honorable James D. Walker, Jr., in the Houston case, which held that a claim arguably excepted from a discharge in Chapter 7 under 11 U.S.C. Section 523(a)(2) was not entitled to one hundred percent payment in a Chapter 13 case. In re Houston, Ch. 13 No. 96-40097 (Bankr. S.D.Ga. Sept. 20, 1996) (Walker, J.).

[4] One possible avenue to allow full payment of alimony/child support and deny it to student loan creditors might have been derived from Carver v. Carver, 954 F.2d 1573, 1578 (11th Cir. 1992) cert. denied, 506 U.S. 986 (1992) ("federal courts generally abstain from deciding diversity cases involving divorce and alimony, child custody, visitations rights, establishment of paternity, child support, and enforcement of separation or divorce decrees"). If the Court should abstain from hearing certain domestic relations issues a logical consequence might be that an alimony/child support creditor's rights are simply unimpaired by the Chapter 13 filing. It was never necessary to analyze the issue from that vantage point, however, because this Court's precedent protected both the child support/alimony claims and the student loan claims.

decisions in Salyer and Bauman and the Eighth Circuit's Groves decision, however, the 1994 amendments to the Code were adopted, establishing child support and alimony obligations as a new class of seventh priority unsecured claims under Section 507(a)(7). *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 § 304, 108 Stat. 4106 (1994). No similar priority was created for government guaranteed student loans. Given these new changes in the Code, and with the rationale of Houston in mind, I find Salyer and Bauman no longer controlling.

In Houston, Judge Walker found that a Section 523(a)(4) non-dischargeable claim was not entitled to one hundred percent payment for two reasons. First, Section 1325(a)(4) does not require including the value of a non-dischargeable judgment in making the Chapter 7 liquidation analysis; second, such requirement would eviscerate the super discharge of Section 1328. In re Houston, Ch. 13 No. 96-40097, slip op. at 8, 9 (Bankr. S.D.Ga. Sept. 20, 1996) (Walker, J.). Clearly the evisceration prong of the Houston decision is moot with regard to both government guaranteed student loans and child support and alimony obligations, since both are now excepted from the super discharge. 11 U.S.C. § 1328(a)(2). I believe, however, that Houston is correct in concluding that in comparing the value of property to be distributed under a Chapter 13 plan with a Chapter 7 liquidation, the Court should not consider the value, if any, of a non-dischargeable judgment. In re Houston, Ch. 13 No. 96-40097, slip op. at 7, 8. The "amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7" includes only the amount of non-exempt property which exists on the date of filing. Id. (emphasis added); *see also* Education Assistance Corporation v. Zellner, 827 F.2d 1222 (8th Cir. 1987) ("Even if the loan could not

have been discharged under Chapter 7, that does not mean that [a creditor] would actually have been paid in a liquidation."). The value, if anything, of a non-dischargeable judgment is wholly dependent on the debtor's future earnings which are not property of a Chapter 7 estate and therefore should not be included in determining whether the value of property received in the Chapter 13 equals the Chapter 7 liquidation value.

Under this rationale neither child support and alimony obligations nor government guaranteed student loans would be entitled to full payment in a Chapter 13 plan under a correct reading of Section 1325(a)(4) absent some other provision of the Code or unless, as the court in Groves held, public policy so dictates. It is now clear that since 1994 the Code so provides. Following Congress' adoption of Section 507(a)(7), child support and alimony obligations are elevated to priority unsecured status and government guaranteed student loans are not. *See* In re Kolbe, 199 B.R. 569, 573 (Bankr. D.Md. 1996) ("Had Congress supported [allowing] debtors to repay student loans in full . . . it could have created a priority status under 11 U.S.C. § 507."); In re Sullivan, 195 B.R. 649, 655 (Bankr. W.D.Tex. 1996) ("The simplest way for Congress to have expressed its support for such a policy would have been for it to have created a priority for such claims in section 507. The fact that it did not is at least some evidence that . . . section 1322 should therefore not be interpreted so as to accord such a priority.")

A Chapter 13 plan does not meet the mandatory requirements of 11 U.S.C. Section 1322 unless it provides for full payment of all priority claims, which now includes

child support and alimony obligations. 11 U.S.C. § 1322(a)(2).[5] Since there is no statutory priority accorded government guaranteed student loans and because full payment is not required under Section 1325(a)(4) as I now understand it in light of Houston, such claims are not entitled to full payment even though the balance of those claims will be excepted from discharge at the conclusion of the Chapter 13 case pursuant to 11 U.S.C. Section 1328. *See* In re Kolbe, 199 B.R. at 574 (Chapter 7 comparison is not sufficient reason to allow Chapter 13 debtor to create special class that will be preferred over other unsecured creditors). Government guaranteed student loans are not, by virtue of their non-dischargeable feature, required to be paid in full in a confirmable Chapter 13 case because neither Section 1325(a)(4) nor Section 507 require such treatment.

II. Unfair Discrimination under Section 1322(b)(1)

Recognizing that a Chapter 13 debtor no longer can be required to fully fund a student loan obligation in debtor's Chapter 13 case, the question remains whether a debtor may elect to do so voluntarily. The clear weight of authority since 1994 holds that for a Chapter 13 debtor to propose to separately classify student loans and pay them at a hundred cents on the dollar, while providing for only pro-rata distribution to other unsecured claims, violates the nondiscriminatory provisions of Section 1322(b)(1).[6] *See generally* In re

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[5] 11 U.S.C. § 1322(a)(2) states:

> The plan shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to different treatment of such claim.

[6] In previous cases, this Court has approved maintenance of payments on a government guaranteed student loan under 11 U.S.C. § 1322(b)(5), *see* In re Salyer, slip op. at 4,5, and will continue to approve plans which make such provisions for monthly payments to a creditor equal to that required pre-petition under the loan documents with the

Chandler, 210 B.R. 898, 902-903 (Bankr. D.N.H. 1997) (nondischargeability as basis for discrimination is unfair under § 1322(b)(1)); In re Gonzalez, 206 B.R. 239, 241 (Bankr. S.D.Fla. 1997) (full payment of student loans "penalizes" unsecured creditors whose debts are dischargeable); In re Kolbe, 199 B.R. at 575 (nondischargeable nature of student loan is not, by itself, reasonable basis for discrimination); In re Sullivan, 195 B.R. at 659 (payment in full of student loans constitutes unfair discrimination).

This Court's concern in the Bauman decision that it is improper "to interpose the automatic stay for a period of five years when full payment is not guaranteed" can be addressed in other ways than by requiring payment in full. *See* Bauman, slip op. at 4 n.1. The student loan creditor might assert a direct good faith attack on the debtor's proposed Chapter 13 distribution, 11 U.S.C. § 1325(a)(3), or might seek relief from the automatic stay in order to collect sums during the pendency of the case which will not be funded by the Chapter 13 plan under 11 U.S.C. Section 362(d). Whether such challenges will be successful, of course, remains to be seen and will be dependent on the facts and circumstances of each case. The point is that the decision herein, while adversely affecting treatment to which these creditors have previously grown to expect in cases pending in this Court, does not leave them remediless in a proper case.

For the above reasons the objection of American General Finance, Inc., to the

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balance at the end of the five-year period to be excepted from discharge under § 1328(a)(1). Such treatment does not contravene § 1322(b)(1) because § 1322(b)(5) prevents a finding of unfair discrimination "as a matter of law." In re Sullivan, 195 B.R. at 658; *see also* Groves, 39 F.3d at 215; In re Benner, 156 B.R. 631 (Bankr. D.Minn. 1993) (Payment under § 1322(b)(5) is "specifically sanctioned by the Code.").

confirmation of the plan is sustained. Debtor is ORDERED to file an amended plan providing for uniform treatment of all unsecured claims including holders of government guaranteed student loan obligations within a period of fifteen (15) days. Upon the failure of the Debtor to take such action the Court will enter a separate order dismissing the case pursuant to the provisions of Section 1307(c)(3) and (5).

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of November, 1997.